

Mileage of Sheriffs.

The amendment of Section 4604 Pol. Code by Chapter 86 (Laws, 1905,) whereby the sheriff is to receive actual and necessary traveling expenses to be paid upon vouchers, whenever he transports persons to the state prison, insane persons to the asylum, or children to the reform school, instead of ten cents a mile for each mile actually and necessarily traveled, as so provided by said section prior to said amendment, is not unconstitutional as violating the provisions of Section 31, of Article V, of the constitution of

Montana, which prohibits the increasing or diminishing of an officer's salary or emoluments after his election or appointment.

Sheriffs are allowed fixed salaries and are supposed in law to receive no more or less than such salary. The legislature can change the manner of paying their actual and necessary traveling expenses in the performance of official duty so long as such change does not increase or diminish the fixed salary which the law provides the sheriff shall receive.

Under Sections 4591 and 4592, Political Code it is clear that the legislature does not consider mileage an emolument of the sheriff's office. If it was an emolument it would have to be paid into the county treasury for the use of the county, as provided in Section 4591.

April 20, 1905.

H. S. Green, Esq., County Attorney, Great Falls, Montana.

Dear Sir:—On the 12th instant we received a letter from the sheriff of your county, enclosing an opinion from you to him regarding the mileage of sheriffs under Senate Bill No. 87, approved March 3, 1905, in which opinion you suggested that the sheriff refer it to our office.

As the law designates what county officers this office shall, upon request, give opinions to; i. e., county attorneys and boards of county commissioners, I, therefore, address this opinion to you instead of the sheriff, in reply to such request.

The questions submitted upon which an opinion is requested are as follows:

What effect does Senate Bill No. 87, approved March 3, 1905, (Chapter 86, Laws 1905) have upon the mileage of sheriffs elected and qualified for such office prior to the approval of that law? Are they allowed ten cents per mile mileage as expenses for transporting prisoners to the state prison, insane persons to the asylum, and children to the Reform School, as provided in Section 4604, Political Code, which was the law at the time they were elected, and when they qualified for such office; or must they present vouchers and claims for and receive only their actual and necessary traveling expenses incurred by them in the transportation of any such persons since March 3, 1905, as provided in said Senate Bill No. 87, amending Section 4604?

We cannot agree with the conclusions reached by you in your opinion to the sheriff. Therefore, we give the following as our opinion on the questions presented.

Section 31, of Article V., of the Constitution of Montana, so far as it applies to the facts in this case, reads as follows:

"No law shall extend the term of any public officer, or increase or diminish his salary or emolument after his election or appointment."

Section 4591, of Chapter IV., of the Political Code, reads as follows:

"The salaries of all county officers are as prescribed in this chapter. No county officer, except as provided in this chapter, must receive for his

own use any fees, penalties or emoluments, for any official service rendered by him, but all fees, penalties and emoluments, of every kind, must be collected by him for the sole use of the county, and are public moneys belonging to the county, and must be accounted for and paid into the county treasurer, as provided in this chapter, and the county treasurer must place all of such fees in the contingent fund of the county."

Section 4592, of the same chapter, reads as follows:

"The county surveyor, coroner, public administrator, justice of the peace, and constables may collect and receive for their own use, respectively, for official services, the fees and emoluments prescribed in this chapter. All other county officers receive salaries."

The latter section names the county officers excepted by Section 4591 from the provisions of said Chapter IV, to-wit: County surveyor, coroner, public administrator, justice of the peace and constables. All other county officers receive salaries, the same being an "annual compensation or salary for services," according to classification, under said Section 4594 of said chapter.

Section 4604, of the same chapter, reads as follows:

"While in the discharge of his duties, the sheriff shall receive ten cents per mile for each and every mile actually and necessarily traveled, and for transporting any person by order of court he shall receive ten cents additional per mile, the same to be in full for transportation and dieting of such person during such transportation. The county shall not be liable for nor shall the board of county commissioners pay for any claim of the sheriff or other officer, for team or horse hire, or any other expense incurred in travel or for subsistence; the fees for mileage named in this section being in full for all such traveling expenses."

What is "mileage", as used in said Section 4604? Is it "salary or emolument," as used in said Section 31 of the constitution?

It is not necessary to go beyond Section 4604 to find the definition of mileage. Such section expressly provides that the ten cents per mile mentioned therein shall be in full for all traveling expenses, including "team or horse hire, of any other expenses incurred in traveling, or for subsistence."

What is usually signified by the term 'mileage', is an allowance for traveling, as so much by the mile." (Power v. County Commrs. 7 Mont. 88.) Also Richardson vs. State, 63 N. E. 594; Am. & Eng. Ency. of Law Vol. 20 p. 613.

Clearly an allowance for traveling expenses, either by the method of mileage or by the payment of actual and necessary traveling expenses, could not be held to be a part of an officers salary or emolument, as such terms are used in the constitution and in Sections 4591 and 4592. If emoluments include "mileage, as defined in Section 4604, Political Code, then it is clearly the express duty of the sheriffs, under Section 4591, to collect the same for the sole use of the county and to account for and pay it into the county treasury, as sheriffs are not among the officers excepted by Section 4592 from the provisions of Section 4591, and the officers mentioned in said Section 4592 receive fees only in full

compensation for their services and are not allowed salary in addition thereto.

At the time Section 4604 was enacted, Section 2311, Political Code, and Sections 2977 and 3089 of the Penal Code, provided that the sheriff should receive actual and necessary traveling expenses in transporting insane persons to the asylum, prisoners to the state prison and children to the reform school. Section 4604 simply changed the method of paying such expenses.

In the case of *Proctor vs. Cascade Co.*, 20 Mont. 317, our supreme court said:

"We look upon Section 4604 as a subsequent statute covering the subject matter of the transportation of any person by a sheriff under order of court, and as intended to be a substitute for Section 2311 and of all other former statutes upon the same subject."

It is the well established principle of law that under constitutional provisions similar to ours, the salary, compensation, fees or emoluments of a constitutional officer cannot be increased or diminished after his election or appointment. Such provisions apply, however, to the salary or emoluments received by the officer as full compensation for the personal discharge of official duty by him, as distinguished from money allowed him to pay for actual and necessary traveling expenses incurred in performing such official duties.

It should be noticed that in said Section 31 of the constitution the language is "salary or emoluments" instead of "salary and emoluments." It is evident that the framers of the constitution used the word "emolument" in the same sense as the word "salary."

The constitutional provision above referred to should be construed that where a salary is provided by law as an official's compensation for services, same cannot be increased or diminished during his term of office, and where fees or other emoluments constitute his salary or compensation for services rendered, same should not be increased or diminished during his term of office.

It is the intention of the law that the salary of sheriffs, as provided by Section 4594, shall be net to them; and, consequently, provision is made for his mileage or traveling expenses. All fees and emoluments collected by him must be turned over to the county, and all necessary traveling expenses incurred by him are paid by the county or state, as the case may be, and he thus receives the full salary provided by law for his office, being reimbursed for his expenses. See *State vs. Granite Co.* Com. 23 Mont. 257.

While the amount of such salary cannot be increased or diminished after his election or appointment, it is well established by numerous authorities that the method or manner of allowing and paying the actual and necessary expenses of his office can be changed by the legislature at any time, and such allowance may be changed during his term of office from mileage to actual expenses. So long as he is allowed his actual and necessary expenses in performing official duties, whereby he gets his salary net, such legislation is not in conflict with the constitutional prohibition against increasing or diminishing salaries or emoluments.

The same question was passed upon by the supreme court of California, in the case of *Kirkwood v. Soto*, 25 Pac. 488, where the facts were as follows: A county superintendent of schools was elected in 1886 for the term of four years. At the time he was elected the salary fixed by law for the office was \$1,800 per annum, and there was no law allowing him his traveling expenses. In 1889, during his term of office, an act was passed providing that county school superintendents should receive their actual and necessary traveling expenses. After the passage of the act of 1889 said county school superintendent incurred actual and necessary traveling expenses to the amount of \$76.75 and presented his claim for the same. The county auditor refused to draw a warrant in favor of such county school superintendent for said \$76.75 upon the ground that the act of 1889, authorizing the payment of actual and necessary traveling expenses of county school superintendents was inapplicable and unconstitutional. so far as this superintendent of schools was concerned, it having been passed after he was elected to such office. The clause of the constitution upon which the county auditor relied read as follows:

“The compensation of any county, city, town or municipal officer shall not be increased after his election or during his term of office.”

The lower court ordered a preemptory writ of mandate to issue commanding the county auditor to draw the warrant. The auditor appealed from such judgment to the supreme court. The supreme court, in affirming the judgment of the lower court, said:

“The question now presented for decision does not appear to have been ever passed upon by the supreme court of this state, but a similar question was before the supreme court of Illinois, in *Briscoe v. Clark Co.*, 95 Ill. 309. The constitution of that state provided that the county board should fix the compensation of all county officers, with the amount of their necessary expenses, ‘provided, that the compensation of no officer shall be increased or diminished during his term of office.’ The supreme court held that it was the salary of the county officer—the compensation for the personal discharge of official duty—which the board was forbidden to change. The compensation or salary was to be fixed in advance, but the expenses were to be determined by the necessity, which the business of the office should develop, and being so, the allowance for expenses could be increased. In our opinion, it was the compensation for services to be rendered, and not the incidental expenses of the office, that the legislature was forbidden, by Section 9 of Article 11 of the constitution, to raise. (See also the following authorities to the same effect: *Gobrecht v. Cincinnati*, 23 L. R. A. 609; *State v. Grimes*, 35 Pac. (Wash.) 361; *Thompson v. Phillips*, 14 O. St. 617; *Brisco v. Clark Co.* 95 Ill. 309; *Milwaukee County Supervisors v. Hackett*, 21 Wis. 620; *Dane v. Smith*, 54 Ala. 47.)

To the contrary, however, see the case of *Apple v. Crawford County*, 105 Pa. St. 302, construing a constitutional provision the same as ours, wherein the court held that the word “emolument,” as used in the constitution, covered the amount received by the sheriff for boarding prisoners, and that where an act was passed, after the election of the sheriff, changing the rate for board of prisoners from fifty cents per day to \$2.50

per week, that it was in conflict with the constitution and that it should not affect the sheriff in office at the time of the passage of the act; that he was entitled, during his term, to fifty cents per day for boarding prisoners.

This case cites no authorities and seems to have been decided upon the definition of emolument given in Webster's Dictionary, which is as follows:

"The profit arising from office or employment; that which is received as a compensation for services, or which is annexed to the compensation of office as salary, fees and perquisites; advantage, gain, public or private."

In construing the words "profit," "compensation for services," "salary," "fees," "perquisites," "advantage," and "gain," used in this definition, to define emolument, the court failed to distinguish between the money an officer is by law allowed to receive for paying actual and necessary expenses of his office; and the fees, perquisites, etc., the officer is by law allowed to receive as a part of his personal salary or compensation. Furthermore, that decision does not apply here, in view of the statutes of our state under which the sheriffs were elected, which expressly fix the salary of sheriffs and provide that all fees, penalties and emoluments of every kind must be collected by the sheriffs for the use of their respective counties, and the "mileage" allowed to them by Section 4604, being expressly declared to be money allowed for actual and necessary expenses.

Section 4606 of said chapter provides that "the compensation received by the sheriff as mileage, while in the performance of official duties," shall not be paid into the county treasury. This is equivalent to saying that, "the compensation received by the sheriff (for paying his actual and necessary traveling expenses) while in the performance of official duties" shall not be paid into the county treasury. This section clearly shows that the only money that the sheriff may retain, other than his fixed salary, is that allowed to pay his actual and necessary expenses while performing official duties. Said Senate Bill No. 87 also provides that he shall receive his actual and necessary traveling expenses while performing his official duties in transporting such persons. Therefore, a sheriff elected prior to the passage of such law can not be heard to complain.

For the reasons, and from the authorities cited above, it is my opinion that sheriffs elected prior to the approval of Senate Bill No. 87, (Chapter 86, Laws 1905) must comply with the provisions of such law, and can only collect the actual and necessary traveling expenses incurred by them in the transportation of any prisoner to the state prison, insane person to the asylum or child to the reform school since the approval of said Senate Bill No. 87.

Respectfully yours,

ALBERT J. GALEN,

Attorney General.

Note.—Opinion sustained by Supreme Court, Nov. 24, 1905, in case of Peter Scharenbroich vs. Lewis and Clark Co., 83 Pac. 482.